(4)

No. 194

Supreme Court of the United States

October Term, 1945.

J. FORT ABELL, Et Al., - - - Petitioners,

versus

A. M. ANDERSON, Receiver of the National Bank of Kentucky, - - - - - Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

LAFON ALLEN,
PERCY N. BOOTH,
EDWARD P. HUMPHREY,
HENRY E. McELWAIN, JR.,
BENJAMIN F. WASHER,
DAVID B. CASTLEMAN,
JAMES W. STITES,
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WESTERFIELD-SONTE CO., INCORPORATED, LOUISVILLE, KY.

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A judgment of reversal is not an adjudication by an appellate court of any questions other than those in terms discussed and decided. Chas. Wolff Packing Co. v. The Court of Industrial Relations of the State of Kansas, 267 U. S. 552, 562; Mutual Life Insurance Co. v. Hill, 193 U. S. 551, 553..... 7

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XI.

In International Paper Co. v. Beacon Oil Co., 290 Fed. 45 (Cir. Ct. of Apps., 1st Cir.), the court in part said:

"But in this case the damages were not liquidated. The defendant had no means of deter-

ALPHABETICAL LIST OF AUTHORITIES.

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No. _____.

J. Fort Abell, Et Al., - - - *Petitioners,*

v.

A. M. Anderson, Receiver of the National Bank of Kentucky, - - - *Respondent.*

PETITION FOR CERTIORARI.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE ISSUED.

In this suit to recover double liability of stockholders in a national bank, under United States Code, Title 12, Sections 63 and 64, the United States Circuit Court of Appeals, for the Sixth Circuit, rendered a decision in this case in conflict with various decisions of other United States Circuit Courts of Appeal on the same matter, and has decided an important question of Federal and general law which has not been, but which should be, settled by this Court, with regard to the particular circumstances here involved. Such decision is in conflict with applicable principles announced by this Court in its decisions. It has so far

departed from the accepted and usual course of judicial proceedings as to sanction such a departure by the lower court, United States District Court, for the Western District of Kentucky, and to call for an exercise of this court's power of supervision.

This application for a writ of certiorari involves only the question as to whether the lower courts should have allowed interest on an unliquidated claim, or should have disallowed interest as contended by the petitioners. The allowance of interest by the lower courts, after reversal by this Court, 321 U. S. 349, is not in accord with that opinion, or in harmony with the applicable principles of law and equity under the situation as here presented.

This case involves interest only, which is seventy-eight per cent on the principal (R. 20, 151, 156, 243).

ERROR TO BE RELIED ON.

In this suit by the Receiver of the National Bank of Kentucky against the stockholders of the Banco-Kentucky Company (treated as stockholders of the bank), the Receiver sought to recover interest of such stockholders upon an unascertained amount of principal (not definitely stated in his petition) upon their double liability as stockholders of the defunct national bank, severally but not jointly (Anderson v. Abbott, R. I, 56-74), thereby disregarding the rule of law that interest is not allowed upon an unliquidated claim (R. 162-167). After reversal of this case by this court, in 321 U. S. 349, then proceeding under the style of

Anderson, Receiver, v. Abbott, the District Court erred in rendering a judgment for interest on principal, determined by an accounting, but not theretofore definitely alleged or ascertained. This was done notwithstanding the circumstance that this court made no allowance of interest (R. 3-18). The United States Circuit Court of Appeals, for the Sixth Circuit, erred in affirming such judgment of the District Court.

STATEMENT.

This suit was instituted by the Receiver of the National Bank of Kentucky to recover of the stockholders of the BancoKentucky Company, respectively, upon their double liability arising out of the failure of the National Bank of Kentucky. The action was brought upon the theory that the stockholders of Banco were in reality stockholders of the National Bank of Kentucky.

The United States District Court, for the Western District of Kentucky, found for the defendants, the petitioners, and dismissed the Receiver's petition, 32 Fed. Supp. 328. The United States Circuit Court of Appeals, for the Sixth Circuit, affirmed such judgment, 127 Fed. (2) 696, but this court reversed the judgment in 321 U. S. 349. This court, in its opinion, held that the defendants, the petitioners, were respectively liable for the principal sum due and unpaid upon their double liability as stockholders, but said nothing whatever about interest (R. 3-18).

When the case went back to the District Court, interest was allowed, which amounted to seventy-eight per cent upon the principal amounts ultimately adjudged against the respective stockholders, the liability being several and not joint (R. 20, 151, 156, 243).

The petitioners then filed in this court a petition for leave to file a petition for writ of mandamus against the District Judge of Kentucky to compel him to eliminate from the judgments entered by him in the District Court the allowance of interest. With this petition the defendants filed a statement of their grounds and a brief. This court, however, refused to allow the petition for writ of mandamus to be filed, but without going into the merits of the case upon the question as to whether interest was allowable or not (Abbott v. Swinford, 322 U. S. 714). The mandamus case was therefore left in the same situation as if no writ had been applied for, because there was no adjudication upon the question involved.

The Receiver of the Bank, in his notice of March 20, 1931, addressed to the stockholders of the Banco-Kentucky Company, advised them of his intention to proceed against them respectively for the assessment made by the Comptroller of the Currency, but only to the extent that the Receiver of the Bank would be unable to collect from the BancoKentucky Company or its receiver (Anderson v. Abbott, R. I, 70).

The Receiver of the National Bank of Kentucky sued the Receiver of the BancoKentucky Company and recovered a judgment upon the assessment made by

the Comptroller of the Currency, *Laurent* v. *Anderson,* 70 Fed. (2d) 819. At the time the Receiver of the Bank filed the present suit against the stockholders of BancoKentucky Company, he had collected from the BancoKentucky Company (which he alleged to be the sole and beneficial owner of substantially all of the shares of stock of the National Bank of Kentucky represented by Trustees Participation Certificates) about $90,000.00. The Receiver of the Bank was collecting more and more from time to time under the judgment against BancoKentucky Company during the progress of the present suit which was filed on February 17, 1936. By May, 1940, Anderson, Receiver of the Bank, had collected from the assets of the Banco-Kentucky Company a total amount in excess of $800,000.00 (R. 65-66).

The Receiver did not know when he gave his notice or when he filed his suit how much money would be due upon final accounting from the petitioners, the defendants in the suit of Anderson, Receiver, v. Abbott, *et al.* (Anderson v. Abbott, R. I, 73).

The Receiver here sued in equity upon two grounds: For an accounting, because an accounting was necessary in order to determine how much principal sum was due from each of the defendant stockholders of the Banco Company, the petitioners here, after the Receiver of the bank had collected all he could collect from the assets of the BancoKentucky Company; and on the further ground that an equitable action would

avoid the necessity of a multiplicity of actions at common law (Anderson v. Abbott, R. I, 74).

It will be observed that the Receiver said, both in his notice to the stockholders of the BancoKentucky Company and in his suit against them, namely, in the case at bar, that he did not know how much he would ask as principal on final hearing against each of the stockholders on his claim against them respectively of double liability. What he said was that he was asking the defendants to pay severally, but not jointly, their proportion of such sum as would be due the Receiver of the bank after he had collected all he could collect from the assets of the BancoKentucky Company. His suit shows he did not know how much that would be. None of the defendants, the petitioners herein, knew or had any means of knowing how much he would be asked to pay on final judgment as a principal amount, and by the same token did not know and could not find out how much interest he would be required to pay upon an unascertained amount of principal. Therefore, the amounts sought in the case at bar by the Receiver of the bank against the BancoKentucky Company stockholders respectively were unliquidated. There was no suit for a fixed amount against any of said defendants, the petitioners herein (Anderson v. Abbott, R. I, 70-74).

BRIEF.

NO INTEREST IS ALLOWABLE UPON AN UNLIQUIDATED CLAIM.

It would seem to be in order to make a few statements of the settled law with regard to procedure before arguing the question presented by the petitioners that no interest is due upon the principal amounts adjudged by this court.

The order refusing to grant leave to the appellants to file a petition for a writ of mandamus was not a decision upon the merits and is not *res judicata*. United States v. California Bridge Co., 245 U. S. 337, 341; Swift v. McPherson, 232 U. S. 51, 57.

A judgment of reversal is not an adjudication by an appellate court of any questions other than those in terms discussed and decided. Chas. Wolff Packing Co. v. The Court of Industrial Relations of the State of Kansas, 267 U. S. 552, 562; Mutual Life Insurance Co. v. Hill, 193 U. S. 551, 553.

The petitioners contend that inasmuch as this court allowed no interest in its judgment, the District Court had no right to depart from or add to the mandate and opinion of this court and adjudge interest after reversal. *In re* Washington and Georgetown Railroad Co., 140 U. S. 91, 96, 97; *In re* Sanford Fork & Tool Co., 160 U. S. 247, 255; *In re* Potts, 166 U. S. 263, 265.

The petitioners further maintain that, if the silence of this court did not mean that no interest was allowed,

then the question as to whether interest should be allowed is an open one for consideration and adjudication later on under such cases as those above referred to. Chas. Wolff Packing Co. v. The Court of Industrial Relations of the State of Kansas, 267 U. S. 552, 562; Mutual Life Insurance Co. v. Hill, 193 U. S. 551, 553.

It is well settled that an unliquidated claim does not bear interest. International Paper Co. v. Beacon Oil Co., 290 Fed. 45 (Cir. Ct. of Apps., 1st Cir.); Grand River Dam Authority v. Jarvis, 124 Fed. (2d) 914 (Cir. Ct. of Apps., 10th Cir.); Saulsbury Oil Co. v. Phillips Petroleum Co., 142 Fed. (2d) 27 (Tenth Circuit); The Isaac Newton (Case No. 7090), 13 Fed. Cases 143.

The Circuit Court of Appeals in this case held that this was the law, but made an exception of the case at bar, holding that the amount due could be determined at the commencement of the action by mere computation. Our answer to this is that if the Receiver (with all facilities at his command and in his possession, such as records, bookkeepers and expert accountants) could not ascertain, without an accounting, what were the principal amounts that would be ultimately asked from the petitioners respectively, how could they, the stockholders of Banco, know or find out what they owed or what would be exacted of them, as either principal or interest, until final judgment against them. Obviously, this question could not be solved until the Receiver collected all he could collect from the BancoKentucky

Company, and his own petition concedes this, and so states.

It is true that the Receiver of the bank estimated what the petitioners would be required to pay, but he said it was a mere estimate. There was no suit for a definite or fixed amount against any of the Banco stockholders, the petitioners herein, and they did not have to pay or tender any amount on an estimate which, at best, was a mere guess as to what they owed. The opinion of the Circuit Court of Appeals, on the second appeal, states that the petitioners did not offer to pay anything. How could they tender anything without knowing what could be required of them, or what was asked of them in some definite way?

The whole question is summed up in International Paper Co. v. Beacon Oil Co., 290 Fed. 45 (Cir. Ct. of Apps., 1st Cir.), where the court in part said:

> "But in this case the damages were not liquidated. The defendant had no means of determining to what extent if at all it was in default; it could not have paid or tendered, and thus stopped interest."

This is the gist of the present case. The petitioners did not know and had no way of knowing what they could respectively pay or tender when the suit was filed, and be acquitted and discharged from all further liability, as to principal and interest thereafter. They did not have to pay or offer to pay upon a mere estimate which they had no way of verifying. This court, in its opinion of reversal, 321 U. S. 349, on page 365,

said its holding might be harsh. Why make it any harsher than it has to be?

The Circuit Court of Appeals in the case at bar said the District Court did not abuse its discretion in allowing interest, but we call attention to the fact that the District Judge did not exercise discretion, because he said he had none. He thought he was bound to allow interest under the opinion and mandate of this court, in which we earnestly maintain the District Judge was in error, as shown by the majority opinion (five to four) of this court, which only decided the question of whether the petitioners were required to pay the amounts of principal sued for.

The whole case, now before this court, is simply this: The respondent is bound by the form of action which he filed and which was proper under the circumstances. He could not ask the petitioners to pay all of the assessment, and did not sue for that amount. He had collected a considerable amount of money from the BancoKentucky Company before he sued the present stockholders, the petitioners, and he collected a great deal more during the course of the case at bar and before final judgment therein. He had to apply these sums as a credit. He could only ask the petitioners for the amount of the assessment which he failed to collect from the Receiver of Banco. This is all he asked. He did not ask for any definite sums from any of the petitioners. He did not know what they would ultimately be required to pay, and they did not know and could not find out.

The cases heretofore cited by the respondent, the Receiver of the bank, holding that interest was allowable in a suit to recover on stockholders' double liability, were cases where the receiver sued the stockholders for the whole amount of the assessment, or at least for a liquidated amount. Obviously, none of these cases are applicable here, where the Receiver sued each of the stockholders upon an unliquidated estimate only.

We respectfully submit that this is a suit upon unliquidated claims, upon which no interest is due according to the settled principle of law upon the subject. In any event, there should be applied to this case, we respectfully maintain, the principle of equity announced in Board of County Commissioners of the County of Jackson, Kansas v. United States, 308 U. S. 343, where the court, on page 352, said:

> "The cases teach that interest is not recovered according to a rigid theory of compensation for money witheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable. United States v. Sanborn, 135 U. S. 271, 281; Billings v. United States, 232 U. S. 261."

We respectfully maintain:

1. That the petitioners should not be required to pay interest (78%) on the amount of principal awarded against them respectively, because the claim asserted against them was unliquidated and did not bear interest;
2. Because applying principles of equity to this case, under all the circumstances shown by the record, interest should not be allowed.

We therefore ask that a writ of certiorari be issued in this case to the end that it may be reviewed on its merits in this court, so far as the allowance of interest is concerned.

This court has the power to grant the writ of certiorari, reverse the judgment of the United States Circuit Court of Appeals, clarify the mandate of this court heretofore issued, upon the ground that it has been misconstrued by the lower courts, and direct that the judgment against the petitioners be purged of interest.

Respectfully submitted,

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Respondent.

BRIEF OF RESPONDENT OPPOSING THE GRANTING OF PETITION FOR WRIT OF CERTIORARI

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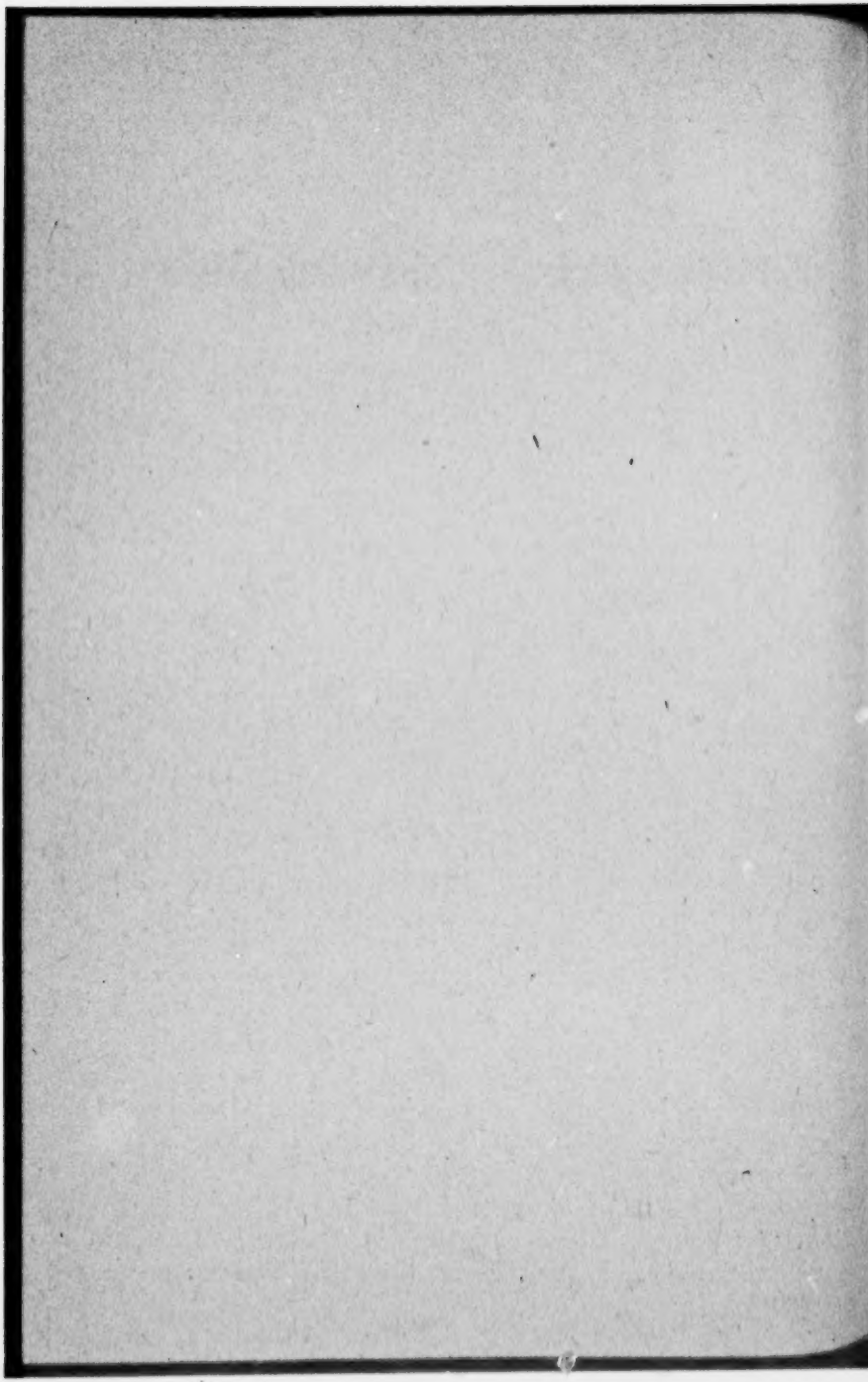

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BRIEF OF RESPONDENT OPPOSING THE GRANTING OF PETITION FOR WRIT OF CERTIORARI

This case presents a very narrow legal question, namely: "*Does a national bank stock assessment bear interest from its due date until it is paid?*"

The District Court, and the Sixth Circuit Court of Appeals in a unanimous opinion, answered this question in the affirmative. The appellants, a few die-hards out of several thousand stockholders, contend that an assessment levied by the Comptroller of the Currency upon the shares of an insolvent national bank does not bear interest.

Petitioners urge that the decision of the Sixth Circuit is "in conflict" with decisions of other circuits, and that it is "in conflict" with the decisions of this court. These two "reasons" urged are without merit. There are no con-

flicting decisions in any of the other circuits. On this point petitioners have cited no decisions and we challenge them to cite a single decision of any court in conflict.

It is difficult to understand how petitioners can contend, in this court, that the decision of the Sixth Circuit is in conflict with the decisions of this court in view of the fact that this court has twice decided that a national bank stock assessment *does* bear interest.

This court first decided this question in 1876, in *Casey* v. *Galli*, 94 U. S. 673, where the opinion, found at the bottom of Page 677, states:

> "... it follows that the amount bears interest from the date of the order. Otherwise, there would be no motive to pay promptly, and no equality between those who should pay then and those who should pay at the end of a protracted litigation."

The point was again raised in this court in 1882, in *Bowden* v. *Johnson*, 107 U. S. 251, where the matter was disposed of in a one-sentence paragraph of two lines (page 263), reading:

> "The liability of defendant bears interest from the date of said letter, August 13, 1875. *Casey* v. *Galli*, 94 U. S. 673."

The point was never again presented to this court, so far as we have been able to find, until May 21, 1944, when these same petitioners raised it by filing a petition for a writ of mandamus against the District Judge. This petition was denied May 29, 1944; *Abbott* v. *Swinford*, 322 U. S. 714.

The point was recently presented to the Seventh Circuit in 1941, in *Garvey* v. *Wilder*, 121 F. (2d) 714, where the opinion written by Judge Evans at page 716 states:

> "We are convinced, and so hold, that under the Federal authorities, interest liability attaches to national bank stock assessments."

Petitioners urge two other "reasons" for the granting of the petition for writ of certiorari. They urge that the case presents an important and unsettled question of Federal law. The question may have been important but it is now settled by the decisions referred to above.

It is respectfully urged that the petition for writ of certiorari be denied.

Respectfully submitted,

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